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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Bone Wear, Inc.

Serial No. 75/374,999

Vincent E. McGeary of Gibbons, Del Deo, Dolan, Griffinger &
Vecchione for Bone Wear, Inc.

Florentina Blandu, Trademark Examining Attorney, Law Office 110
(Chris Pedersen, Managing Attorney).

Before Hohein, Bucher and Holtzman, Administrative Trademark
Judges.

Opinion by Hohein, Administrative Trademark Judge:

Bone Wear, Inc. has filed an application to register
the mark "6 4 3 DOUBLE PLAY" for "clothing and active wear,
namely, hats, T-shirts, jerseys and jackets".¹

¹ Ser. No. 75/374,999, filed on October 17, 1997, which alleges a bona
fide intention to use the mark in commerce.

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when applied to its goods, so resembles the mark "DOUBLE PLAY," which is registered for "girdles and brassieres,"² as to be likely to cause confusion, mistake or deception.

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested. We affirm the refusal to register.

Preliminarily, we note that in any likelihood of confusion analysis, two key considerations are the similarity or dissimilarity of the goods and the similarity or dissimilarity of the marks. See, e.g., *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).³ As to the respective goods, applicant argues that its mark "is used with sport-oriented clothes," while registrant's mark is used in connection with goods which "are commonly referred to as foundation garments." Registrant's girdles and brassieres, being items of underwear, are "tight fitting and intended to support and contour the body," applicant notes, while its hats, T-shirts,

² Reg. No. 718,269, issued on July 11, 1961, which sets forth dates of first use of April 4, 1960; first renewal.

³ The court, in particular, pointed out that: "The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks."

jerseys and jackets are items of outerwear and, in particular, sportswear. Applicant consequently insists that "[b]ecause the respective goods are dissimilar, there is a competitive distance in the goods, and the purchasers of the respective goods are not likely to be common to both." Specifically, applicant points out that registrant's "[g]irdles and brassieres are not likely to be purchased by the majority of males, because they are traditionally female clothing." Although applicant concedes that its goods and those of registrant would be purchased by females, applicant contends that, by their very nature, the respective goods are "not complementary or companion items, like shoes and suits," and thus "[t]his competitive distance ... differentiates the source of the goods."

The Examining Attorney, on the other hand, argues that the respective goods "are highly related in that they ... consist of clothing items that may be purchased by everybody." In particular, she maintains that "applicant's clothing is not limited to boys or men and that the applicant's hats, t-shirts, jerseys and jackets can be purchased and ... used by women as well." In addition, she "finds that the registrant's goods are not limited to women only" in that they may be purchased by men as well as women.⁴ Furthermore, although noting that, as

⁴ The Examining Attorney further insists that registrant's goods are closely related to applicant's goods because "[t]here is nothing to

identified, applicant's goods are not restricted to sport-oriented or athletic apparel, the Examining Attorney insists that, even if such were the case, the item "brassieres" in registrant's registration is broad enough to include bras which are worn in conjunction with exercising, playing sports or participating in other physically active activities. She specifically points out that, with respect to "brassieres":

[S]uch an undergarment comes in all styles and that one of these styles is in the nature of a sports bra. Sports bras are commonly used in connection with athletic wear. Therefore, it is likely that the same consumers, in one shopping trip[,] will purchase the applicant's goods together with the registrant's goods.

stop men from [sic] wearing the same type of undergarments that a woman would wear, namely, brassieres and girdles." However, this argument strikes us as ridiculous inasmuch as men typically would not choose to wear women's foundation garments since they obviously have no need for the support provided by brassieres and girdles. Moreover, the very definitions which the Examining Attorney requests that the Board take judicial notice of undermine, rather than support, her position inasmuch as the excerpts from the Random House Unabridged Dictionary (2d ed. 1993) at 254 and 807 respectively define "brassiere" as "a woman's undergarment for supporting the breasts. Also called bra" and list "girdle," in relevant part, as "a lightweight undergarment, worn esp. by women, often partly or entirely of elastic or boned, for supporting and giving a slimmer appearance to the abdomen, hips, and buttocks." Thus, in common parlance, such terms refer to women's undergarments and do not include those for men. There is simply nothing of record, in consequence thereof, to show that men constitute a significant class of the normal or usual customers for registrant's goods. As our primary reviewing court has cautioned: "We are not concerned with mere theoretical possibilities of confusion, deception, or mistake or with de minimis situations but with the practicalities of the commercial world, with which the trademark laws deal." *Electronic Design & Sales Inc. v. Electronic Data Systems Corp.*, 954 F.2d 713, 21 USPQ2d 1388, 1391 (Fed. Cir. 1992), citing *Witco Chemical Co., Inc. v. Whitfield Chemical Co., Inc.*, 418 F.2d 1403, 164 USPQ 43, 44-45 (CCPA 1969).

Finally, the Examining Attorney contends that the respective goods are commercially related inasmuch as she has made of record a number of third-party registrations "where registrants offer brassieres or girdles in connection with sports wear articles." She argues that such evidence "serves to show that it is reasonable for a consumer to believe that the registrant has expanded use of its mark to also include goods listed by the applicant under its mark."

It is well settled that the issue of likelihood of confusion must be determined on the basis of the goods as they are set forth in the involved application and cited registration. See, e.g., CBS Inc. v. Morrow, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983); Squirtco v. Tomy Corp., 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983); and Paula Payne Products Co. v. Johnson Publishing Co., Inc., 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973). Thus, where the goods in the application at issue and in the cited registration are broadly described as to their nature and type and, as is the case herein, there are no restrictions in the respective identifications of goods as to their channels of trade or classes of customers, it is presumed in each instance that in scope the application and registration encompass not only all goods of the nature and type described therein, but that the identified goods move in all channels of trade which would be

normal for such goods and that they would be purchased by all potential buyers thereof. See, e.g., In re Elbaum, 211 USPQ 639, 640 (TTAB 1981). No weight, therefore, may be given to applicant's contentions that its "clothing and active wear, namely, hats, T-shirts, jerseys and jackets," is limited to "sport-oriented clothes."

Furthermore, it is well established that goods need not be identical or even competitive in nature in order to support a finding of likelihood of confusion. Instead, it is sufficient that the goods are related in some manner and/or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons under situations that would give rise, because of the marks employed in connection therewith, to the mistaken belief that they originate from or are in some way associated with the same producer or provider. See, e.g., Monsanto Co. v. Enviro-Chem Corp., 199 USPQ 590, 595-96 (TTAB 1978) and In re International Telephone & Telegraph Corp., 197 USPQ 910, 911 (TTAB 1978).

In the present case, we agree with the Examining Attorney that the third-party registrations of record are sufficiently probative to establish that applicant's goods, while specifically different from registrant's goods, are nevertheless so closely related thereto that, if sold under the same or similar marks, a likelihood of confusion as to the origin or

affiliation of the respective goods would result. In this regard, the Examining Attorney has introduced in support of her position copies of eight use-based third-party registrations of marks which, in each instance, are registered for one or both of registrant's goods, on the one hand, and at least one or more of applicant's goods on the other. Five of such registrations, in fact, list in each case not only girdles and brassieres (or bras), but also include t-shirts, jackets and/or hats. Although the third-party registrations are not evidence that the different marks shown therein are in use or that the public is familiar with them, they nevertheless have some probative value to the extent that they serve to suggest that the goods listed therein are of a kind which may emanate from a single source. See, e.g., In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1785-86 (TTAB 1993) and In re Mucky Duck Mustard Co. Inc., 6 USPQ2d 1467, 1470 (TTAB 1988) at n. 6. Clearly, both registrant's and applicant's goods would be sold through the same channels of trade, such as retail clothing stores, boutiques, department stores and mass merchandisers, to the identical classes of purchasers, including women in general as well as those who favor active lifestyles.

Turning, therefore, to consideration of the respective marks, applicant argues that its "6 4 3 DOUBLE PLAY" mark, when used in connection with its sportswear items, conveys an entirely different impression, namely, that of sports activity, than does

registrant's "DOUBLE PLAY" mark, which when used in connection with women's foundation garments, such as girdles and brassieres, engenders the image of support and contour. According to applicant (*italics in original*):

"6 4 3 DOUBLE PLAY" is a baseball term referring to a play where the shortstop, second baseman and first baseman combine to record two outs on a single play. In baseball, the scoring system used to record the game assigns each player in the field a numeral. When a play is made in the field, the play is recorded using a number system. The term 6-4-3 has received such wide-spread use in baseball that it has meaning to persons having even a passing familiarity with baseball, even when they are not familiar with the baseball scoring system. The term suggests the "moving" image of a shortstop fielding a ground ball, flipping it to a second baseman, who then fires the ball to first base.

In 1961, ... Registrant apparently limited its mark to woman's [sic] underwear: brassieres and girdles. Registrant made no attempt to use the term for outerwear and in particular, activewear or sportswear. The term "DOUBLE PLAY" chosen by Registrant for its "foundation garments" clearly suggests the "static" image of *double support* provided by these foundation garments. The term in this context delivers no connotation with respect to outerwear.

Applicant consequently maintains that, not only do the numerals "6 4 3" add three syllables to its mark, thereby giving it substantial differences in sound and appearance, but such numerals, by referring to the type of double play "where the short stop [sic] (6) catches a ground ball, throws it to the

second baseman (4), where the first out is gained, who then throws the ball to the first baseman (3), where the second out is gained," makes applicant's "6 4 3 DOUBLE PLAY" mark "more distinctive" inasmuch as none of such imagery is conveyed by registrant's "DOUBLE PLAY" mark. By contrast, applicant urges that:

Close-fitting women's underwear, especially restrictive underwear like girdles, are not typically associated with sports, especially baseball. A woman, when purchasing a "DOUBLE PLAY" brassiere or girdle, is unlikely to imagine a baseball play. Rather the consumer is likely to react as the Registrant obviously intended: the underwear will be associated with the double action of support and contour. The purchaser of Applicant's loose fitting sports outerwear (T-shirts, hats, jackets and jerseys) is not likely to associate the source of these goods with the maker of the doubly supportive and contour shaping "DOUBLE PLAY" brassiere. Therefore, the meaning of Applicant's "6 4 3 DOUBLE PLAY" mark and the meaning of Registrant's mark are wholly different as applied to their respective goods and evoke different images in the consumer.

We are constrained to agree with the Examining Attorney, however, that confusion is likely. As she points out, rather than serving to distinguish the respective marks, the well-known baseball term "6 4 3" simply designates a particular type of double play. Thus, when considered in their entireties, it is the term "DOUBLE PLAY" which constitutes the dominant and distinguishing element of applicant's "6 4 3 DOUBLE PLAY" mark

and which is identical to registrant's "DOUBLE PLAY" mark. The manner of keeping score in baseball by means of a numbering system for the players is so well known and established that the term "6 4 3" would not be viewed as arbitrary or otherwise distinguishing matter when used in connection with the baseball term "DOUBLE PLAY".

The respective marks, consequently, would be viewed, when considered in their entireties, as being appreciably alike in sound, appearance and connotation. Moreover, both marks, contrary to applicant's contentions, convey substantially the same overall commercial impression, given that the term "double play" is such a common and familiar expression to all members of the general public, including women as well as men. Therefore, even though foundation garments like registrant's girdles and brassieres undoubtedly provide the dual functions of support and contour to the body of the wearer, we simply fail to see why consumers would understand registrant's "DOUBLE PLAY" mark to have only a significance which is unrelated to its ordinary or everyday meaning, like in applicant's "6 4 3 DOUBLE PLAY" mark for its clothing and active wear, as a well-known baseball term.

Instead, we find that purchasers and potential customers, who are familiar or acquainted with registrant's "DOUBLE PLAY" mark for girdles and brassieres, would be likely to believe, upon encountering applicant's substantially similar "6 4

3 DOUBLE PLAY" mark for its hats, T-shirts, jerseys, and jackets, that such closely related items of apparel emanate from, or are sponsored by or associated with, the same source. Furthermore, even if such consumers were to notice the difference in the respective marks, it would still be reasonable for them to believe, for example, that applicant's "6 4 3 DOUBLE PLAY" mark for its clothing and active wear designates a new or additional product line emanating from, or sponsored by, the same source as the foundation garments offered by registrant under its "DOUBLE PLAY" mark.

Decision: The refusal under Section 2(d) is affirmed.

G. D. Hohein

D. E. Bucher

T. E. Holtzman
Administrative Trademark Judges,
Trademark Trial and Appeal Board